BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. TAMALPAIS UNION HIGH SCHOOL DISTRICT.	OAH Case No. 2015010202

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on December 16, 2014, naming the Tamalpais Union High School District. The matter was continued on January 29, 2015.

Administrative Law Judge Charles Marson heard this matter in Larkspur, California, on May 12, 13, 14, and June 2, 2015.

Peter Sturges, Attorney at Law, represented Student. One or both of Student's Parents attended throughout the hearing. Student attended substantial portions of the hearing.

Jan E. Tomsky, Attorney at Law, represented Tamalpais. Wesley Cedros, Senior Director of Student Services, and Amira Mostafa, Assistant Director of Student Services, attended the hearing on behalf of Tamalpais.

A continuance was granted for the parties to file written closing arguments, and the record remained open until May 30, 2015. Upon timely receipt of the declarations and written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES[1]

Issue I: Did Tamalpais deny Student a free appropriate education during the 2012-2013 school year, beginning December 16, 2012, by:

a. failing to offer Student an individual transition plan until March 25, 2013;

b. failing to provide Student with an appropriate transition plan;

c. failing to report Student's progress on transition plan goals throughout the year;

d. failing to offer Student appropriate academic goals;

e. failing to provide Student with an assessment plan or assessment until

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[1] At hearing, the ALJ granted in part Student's motion to modify the issues as they were set forth in the Order Following Prehearing Conference by inserting the words "or assessment" in Issues I.e and II.c in order to reflect Student's contentions more accurately. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made, and some minor wording changes are made here. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) At hearing, Tamalpais objected to the addition of the words "or assessment" in the statement of issues I.e and II.c on the ground that Student's complaint was limited to the allegation that Tamalpais failed to present Parents an assessment plan, not an assessment. It renews that objection in its closing brief. The complaint does contain one allegation limited to the assessment plan. However, it contains another allegation that Tamalpais "failed to properly assess [Student] in time for his transition from Heritage School back to Redwood High School for his senior year." A liberal reading of the complaint, which was filed by Parents before they retained an attorney, shows that Parents were addressing the tardiness of the assessment as well as the assessment plan.

January 2014, after Parent requested the plan in April 2013;

f. failing to administer the math and social studies portion of the Spring 2013 STAR test to Student; and

g. failing to offer Student an alternative standardized assessment to the STAR test in Spring 2013?

Issue II: Did Tamalpais deny Student a FAPE during the 2013-2014 school year by:

a. failing to include all required team members in the February 28, 2014 individualized education program team meeting so Parents' request for continued social skills training could be addressed;

b. predetermining Student's placement and services at the February 28, 2014 IEP team meeting;

c. failing to provide Student with an assessment plan or assessment until January 2014, after Parent requested the plan in April 2013;

d. failing to provide Student with sufficient social skills training;

e. failing to follow the recommendations of the December 2013 neuropsychological report at the February 28, 2014 IEP team meeting;

f. failing to offer Student appropriate goals in the areas of transition, academics, and social emotional needs;

g. failing to offer Student an appropriate ITP;

h. failing to offer Student placement in the least restrictive environment for social studies, world history, and economics classes;

i. failing to offer Student appropriate services including tutoring and social coaching;

j. failing to provide Student appropriate supports and services to transition from a residential, therapeutic placement to a comprehensive high school; and

k. failing to provide Student's progress on annual goals and transition goals at

the final IEP team meeting held before Student graduated?

SUMMARY OF DECISION

This decision holds that Tamalpais denied Student a FAPE at the IEP team meeting on February 28, 2014, when it failed to have present a person with authority to commit the District to a decision on the merits of Parents' request for continued funding of social skills training at Autistry Studios. On all other issues, Tamalpais did not deny Student a FAPE.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 19-year-old male who lives with Parents within the boundaries of Tamalpais, a high school district. Since preschool he has been eligible for special education and related services, primarily due to emotional disturbance and sometimes also due to autism.

2. When Student entered Tamalpais High School in school year 2010-2011 as a freshman, he was not receiving any special education or related services. As explained below, Parents had declined to consent to all special education services for Student. In the middle of his sophomore year, Student was transferred to Tamalpais's Redwood High School as the result of disciplinary and psychiatric problems he experienced while attending Tamalpais High. However, he soon suffered so complete a psychiatric collapse that the parties placed him in Heritage Residential Treatment Center in Provo, Utah, from April 2012 to July 2013 pursuant to a new IEP.

3. In August 2013, Student returned to Redwood High School for his senior year, and graduated with a diploma in June 2014. He enrolled in fall 2014 in the College of Marin.

4. This matter was filed on December 16, 2014, and under the two-year

statute of limitations Student cannot premise liability on claims of which Parents were aware before December 16, 2012. However, events before that date strongly influenced the decisions of Student's IEP team made during the limitations period, and informed this decision as well.

STUDENT'S UNIQUE NEEDS

5. Student was made eligible for special education in preschool because of a speech and language impairment. At four and one half years of age, he was diagnosed as having Pervasive Developmental Disorder Not Otherwise Specified and was thought to display autistic-like behaviors. He attended kindergarten and grades one through five at Strawberry Point Elementary School in Mill Valley. By second grade Student had mental health difficulties that were evident at school, and he began receiving services from County Mental Health. He began psychotherapy in second grade and was placed on medications. In the third grade he was reclassified as emotionally disturbed. During those years, he progressed academically, but he was isolated and withdrawn from peers. In a triennial assessment in third grade he was described as a "very anxious child who also seems to experience some depressive symptoms."

6. For the sixth grade, Student moved to Mill Valley Middle School and received resource support. He continued to do well academically but displayed poor social and emotional health, with symptoms of anxiety and depression. He became preoccupied with his social relationships at school, especially with a small group of peers, and misbehaved and made inappropriate comments in class. By the end of the eighth grade, Student rebelled against being in special education, and Parents declined to approve an IEP for high school. As a result, in fall 2010, Student entered ninth grade at Tamalpais High School as a general education student.

7. Student's behavior deteriorated in his freshman year on the comprehensive high school campus, although he maintained a grade point average of

3.29. He was occasionally aggressive and belligerent with other students. In May 2011, he was suspended three times over the course of two weeks for actions and comments toward a female student who perceived his conduct as "stalking." Student could not understand why she no longer wished to be his friend, and defied all orders to leave her alone, engaging instead in a pattern of harassment that caused Tamalpais to consider expelling him or seeking a court order forbidding his presence on the campus. Student began to talk of suicide.

8. In spring 2011, Parents reconsidered whether Student needed special education, and since Student was still eligible for it, IEP team meetings and assessments followed. But Student's fear of being exposed as not normal, and therefore needing special education, was so great that, according to a Tamalpais assessor in May 2011, he flattened himself against a wall and pulled down a shade so other students could not see that he was being assessed. Parents agreed with Tamalpais that Student needed an IEP, but deferred to his wishes and did not accept one.

9. In fall 2011, Student was disruptive in class at Tamalpais High and was suspended for misbehavior twice more. He continued to harass the female student who had rejected his friendship by following her, berating her, and blocking her path when she tried to move away. His social anxieties worsened; he worried constantly about what others thought of him, and frequently perceived humiliation and rejection by his peers. His academic performance also declined, largely due to lagging attendance and failure to complete assignments. At an IEP team meeting on November 1, 2011, Tamalpais proposed to place Student in a special day class it then operated in conjunction with County Mental Health, where he could receive counseling and social skills supports. Again Student resisted, and Parents declined to sign an IEP placing him there.

10. Half way through Student's sophomore year, in order to defuse the situation at Tamalpais High, Parents and the District agreed to move Student to

Redwood High School. Student was so upset by this move that he has perseverated on its perceived injustice ever since. At Redwood High, in the second semester of his sophomore year, he focused obsessively on his removal from Tamalpais High, threatened suicide, cut classes and began failing them, and was repeatedly taken by Parents to emergency psychiatric treatment in hospitals. During this period, Parents finally accepted a single special education class for Student called Academic Workshop, but Student did not want any of his peers to know he went to the class, and rarely attended it.

11. Dr. Nancy Sullivan, a pediatric neuropsychologist in Palo Alto, conducted an independent educational assessment of Student in February 2012. She found that Student lacked an independent sense of self, ego strength, and a sense of personal competence. He had "an inability to regulate and moderate behavior in response to emotional experiences" and presented a "heightened risk of violent outbursts when he feels thwarted or denied what he wants." He also had "a tendency to distort reality to match his desired outcome," perceived himself as a victim not responsible for his difficulties, and was quick to blame others for them. He presented with features of Asperger's Disorder, Generalized Anxiety Disorder, and Schizophreniform Disorder. These combined conditions resulted in "rigidity, perseverative topics and interests, beliefs that verge on the delusional, significant impairment in functioning, lack of or faulty perspective-taking, and poor regulation of affect and behavior." Student suffered from the delusion that his teachers and other adults discussed his situation with other students behind his back. Anyone who did not support his view of things was "either villainized or suspect." His thinking was becoming increasingly disorganized, and he was at increased risk of harming himself or others, "given his age, size and expectation that he will get his own way." Dr. Sullivan recommended that Student be placed either in day treatment or in a residential treatment center.

12. In March 2012, County Mental Health reported its assessment of Student. Its diagnoses were quite similar to those of Dr. Sullivan. The County Mental Health report added that student was "extremely anxious and excruciatingly self-conscious," dwelled in paranoid ideation, saw conspiracies against him, and was in a constant state of anxiety and anger. It identified chronic feelings of rejection, a sense of unfairness from the world at large, delusional thinking, grandiosity, obsessions, and inflexibility. County Mental Health proposed to help Student make a transition to a residential treatment center. In April 2014, Parents consented to an IEP placing Student at Heritage. Heritage's intake assessment confirmed observations in previous assessments that Student's family relationships played a substantial part in his emotional difficulties. His relationship with Mother was particularly troublesome for him; Heritage's intake assessment listed that relationship first among the reasons for his need for residential treatment.

STUDENT'S JUNIOR YEAR (SCHOOL YEAR 2012-2103)

Validity of Junior year Transition Plan

13. Student's condition improved considerably over a year at Heritage, and in spring 2013 the parties began planning for his return to California, which was tentatively scheduled for summer 2013. Student's annual IEP team meeting was held on March 5, 2013, while he was still at Heritage, for the purpose of writing an IEP for the 2013-2014 school year. The parties assumed that Student would return to Redwood High in fall 2013. As a result of that meeting, and continuation meetings on May 2 and June 10, 2013, the parties reached agreement on an IEP for school year 2013-2014 that placed Student partly in the general education environment and partly in a special day class.

14. The March 5, 2013 IEP included a transition plan.[2] The plan reported that Student took the World of Work Career Interest Survey and wanted to be either a professional actor or a scientist such as a microbiologist, a biologist, or a geneticist. The plan set forth the following goals in three categories:

a) Training or Education: "Upon completion of school . . . [Student] will attend Marin Community College."

b) Employment: "Upon completion of school . . . [Student] is uncertain at this time whether he wants to work part-time or be a full-time student."

c) Independent Living: "Upon completion of school [Student] wants to live with his parents for the first two years of community college."

15. To support the first goal, the plan provided for activities such as meeting the Disabled Student's counselor at the College of Marin and learning how to enroll in classes and secure accommodations there. To support the second, Student was to get an on-campus job for two months while still at Heritage, to see if he could maintain his grades and work at the same time. To support the third, Student was to "learn and practice taking public transportation to and from home and College of Marin." The plan also listed Student's graduation requirements and course of study. Each of the transition goals was cross-referenced to the same three annual goals for social-emotional improvement, interpersonal conflicts and employment in the IEP. The plan did not contain any specific community activity.

16. The March 5, 2013 transition plan addressed Student's independent living

[2] The transition plan and the IEP that accompanied it were first discussed on March 5, 2013, but not agreed to until summer 2013. The plan is referred to here as the March 5, 2013 transition plan.

skills only in the goal that Student would live with Parents, and the activity that he would learn was to take the bus to the College of Marin. The IEP notes that Student "does fairly well getting his activities of daily living (chores) completed each day." It adds that there have been some problems with his personal hygiene, but he had been improving in that respect and just needed prompts and reminders from others.

17. The notes of the March 5 and May 2, 2013 IEP team meeting show that Mother raised broader concerns about Student's independent living skills. She was concerned, for example, "about his ability to do ordinary life skills (e.g. sweeping the deck)." However, Heritage had been providing the parties detailed quarterly reports of Student's progress, and they made no mention of any deficit in independent living skills. Student's therapist at Heritage, who attended the meeting by telephone, suggested that the issue be discussed in family therapy. He added that "not sweeping the deck was [Student] not wanting to do the task. [Student] knows how sweep. He has to do chores at Heritage (e.g. cleaning the bathroom). The therapist suggested that there be "consequences for being willing to do chores." Mother raised a similar concern about kitchen skills, based on an incident in which Student turned on the gas of the stove without turning on the flame. His defense was that he "forgot" how to use the stove.[3] The therapist suggested that that incident, too, should be addressed in family therapy.

18. Jan Johnston-Tyler testified for Student as an expert on transition plans. Ms. Tyler is the founder and chief executive officer of EvoLibri Consulting, a Santa Clara

[3] Mother's concern that Student could not cook was contradicted by her communication to the IEP team on March 20, 2013, that Student "has been grocery shopping for himself, including walking to and from the market, since seventh grade, on occasions when he decides to cook something special."

firm that counsels disabled youth between 14 and 25 years old on obtaining services from agencies and on transitions from school to adult life. Most of them have IEP's or 504 plans.[4] Ms. Johnston-Tyler frequently appears as an advocate for parents, and participates in IEP team meetings in that role.[5] She opined that the March 5, 2013 transition plan was "not what I would want to see" and was inadequate in many ways.

19. Ms. Johnston-Tyler opined that the goals in the March 5, 2013 transition plan were too vague and general, "barely" measureable, and written with too much reliance on what Student told school staff. In her opinion, a goal should not just provide for a meeting with the college's disabled student's counselor; it should give information on how to register for services there and set forth all the steps required for enrolling and obtaining accommodations. A goal of becoming a scientist should state the steps to accomplish the goal, including the requirements for bachelor's degrees and Ph.D's. Activities like learning to ride the bus to the College of Marin should not depend solely on parents. She also opined that good transition plans should be multi-year plans, and that the relationship between transitional goals and annual goals should be more direct

[4] A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et seq. (2000).) Generally, that Act requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

[5] Ms. Johnston-Tyler has a master's degree in counseling, with an emphasis on careers, from the University of Santa Clara. She belongs to the American Psychological Association, the American Counseling Association, and other organizations. Her career before 2007 (when she founded EvoLibri) was largely in technical writing and publishing.

than in the March 5, 2013 plan. Ms. Johnston-Tyler believed that a transition plan should identify the Department of Rehabilitation and other outside agencies that could help Student.

Incomplete STAR Testing in Junior Year

20. Student's March 5, 2013 annual IEP provided that Student would take the STAR test in English language arts, math, science, and history/social science. Student took the science and English language arts portions of the STAR test in spring 2013 at Heritage, but did not take the math or history/social science portions. The circumstances were not made clear at hearing. Student wanted to attend a graduation party for a peer which was occurring while he took the science and English language arts portions of the test. He got a very low grade on the latter; according to him, he just randomly filled in the bubbles so he could get to the party. The evidence did not show whether he walked out on the other parts of the test, or whether Heritage did not attempt to give him the other parts, or whether some other cause intervened.

21. Tamalpais did not administer any alternative test. Parents wanted information from the math and history/social science portions of the STAR test so that they could be properly informed while participating in the writing of goals for Student at IEP team meetings.

22. Wesley Cedros[6] and Amira Mostafa[7] established that the STAR was a state test that California stopped administering in 2013. It gathered aggregate information to determine the quality of schools; it was not used to determine any part of a student's educational program. Father believed STAR results were used for establishing special education eligibility. On February 14, 2014, he had agreed that no further assessments were necessary for Student's triennial meeting, and that document review would be sufficient. On the form document memorializing that agreement, someone checked a box asserting that "the members of the Assessment Planning team have reviewed . . . STAR testing, transcripts." Mr. Cedros established that STAR results are part of a consideration of the need for assessments, but do not bear on an eligibility

[6] Mr. Cedros is Tamalpais' Senior Director of Student Services. He has a bachelor's degree in education with a specialty in school psychology, and is credentialed as a school psychologist and an administrator. He has been a school psychologist for districts in San Leandro, Foster City, and Palo Alto. He was first employed by Tamalpais in 2011 as an assistant principal at Redwood High School, and then became its Director of Special Education. He knows Student from his time at Redwood High as well as in his current role.

[7] Ms. Mostafa became Tamalpais's Assistant Director of Student Services in spring or early summer 2013 as part of a reorganization of Tamalpais's special education responsibilities, and became responsible for dealing with Student at that time. She has a master's degree in school and clinical psychology from San Francisco State University, is credentialed both in California and nationally as a school psychologist, and also has California credentials for administration and counseling. Ms. Mostafa worked for Tamalpais as a school psychologist from 2003 to 2013.

determination or affect educational programming.

Responsibility for Delay of Dr. Cunningham's Independent Assessment

23. In her independent evaluation of Student in 2012, Dr. Sullivan had great difficulty assessing him in his then-deteriorating condition because he was preoccupied with returning to Tamalpais High School, and his initially cooperative attitude changed when he discovered Dr. Sullivan could not return him there. According to her report, Student's behavior "quickly deteriorated when he was asked to complete test items and when his perceptions were not endorsed." He had very limited endurance, and quickly regressed into behavior typical of a much younger child. He became "agitated and disorganized in his rationalizations and accusations", and presented a "lengthy chronicle of injustices" from which he thought he had suffered. Dr. Sullivan observed that "[w]hile dealing with a toddler's tantrums is never simple, it is much easier to contain a 3 or 4 year old than a 16 year old. [Student] does not have the judgment, behavioral control or coping skills to safely resolve feelings of infantile rage . . .."

24. In spring 2013, during Student's junior year at Heritage and when the IEP team was contemplating Student's return to Redwood High for his senior year, Parents decided that Dr. Sullivan's assessment was incomplete and obsolete, and that he needed another assessment. Parents made it clear that they disagreed with Dr. Sullivan's previous assessment. They hoped it could be completed and reported before the beginning of the school year in August. In an April 12, 2013 email to Mr. Cedros, Mother requested a new assessment by a qualified psychologist or neuropsychologist, but did not specify in her request whether she sought an assessment by Tamalpais or by an independent assessor. Tamalpais did not immediately respond or provide Parents an

assessment plan.[8]

25. Parents again asked for a new assessment at the May 2, 2013 continuation of the March 5, 2013 IEP team meeting. Mr. Cedros observed that Heritage was supplying a great deal of recent information about Student, but agreed to Parents' assessment request. The IEP notes establish that Parents agreed to postpone receipt of an assessment plan until the June 10, 2014, IEP team meeting, at which time the team would identify the key questions the assessment should address.

26. However, Mother soon became concerned that delaying the assessment might mean it would not be completed before the beginning of the coming school year, and in an email on or about May 15, 2013, sought to speed the process. She apologized for what she termed a "misunderstanding" at the May 2, 2013 IEP team meeting, and stated that she had not agreed to postpone the assessment itself until the start of the next school year. Mother then proposed three alternatives, one of which was hiring Dr. Sullivan again to assess Student in August. Mother noted she was already in contact with Dr. Sullivan about the assessments to be given. Mr. Cedros began the process of hiring Dr. Sullivan and sent Parents an assessment plan on or about May 24, 2013, with an apology for his previous delay in providing the plan.

27. Dr. Sullivan had agreed to do the assessment by June 5, 2013, when Mother notified Mr. Cedros that she no longer agreed to an assessment by Dr. Sullivan. She changed her mind based on her belief that Dr. Sullivan had breached her duty of confidentiality to Student during a communication with one of Tamalpais's attorneys in 2012; an allegedly insulting email from that attorney in 2012; and some negative

[8] Tamalpais routinely gives parents assessment plans whether the assessment will be done by the District or is an independent evaluation.

comments about Student in Dr. Sullivan's 2012 assessment. She proposed that the assessment be conducted by an independent psychologist who had no relationship to Tamalpais or its law firm, and as one possibility suggested Dr. Mary Cunningham in Corte Madera.

28. Notes of the IEP meeting on June 10, 2013, state that Tamalpais "is trying to find an evaluator," but there was no evidence about those efforts, and no evidence that the District searched for an evaluator between June 10 and August 8, 2013. Student returned from Heritage on June 19, 2013, and was available for assessment after that date. On August 8, 2013, Parents again proposed Dr. Cunningham as the assessor, and Tamalpais hired Dr. Cunningham on August 12, 2014. District emails from this period repeatedly referred to the assessment as an independent assessment, and Parents did not disagree with that characterization.

29. In the following weeks Tamalpais obtained permission from Parents to share information with Dr. Cunningham, sent her many of Student's records, and negotiated a fee. These preliminaries were completed on August 27, 2013. Dr. Cunningham then took a scheduled 10-day vacation in early September 2013. Since school had begun and Parents did not want Student to miss classes for assessment, they proposed that the assessment begin on Monday September 16, 2013, a school holiday, which it did.

30. Dr. Cunningham also had substantial difficulty in assessing Student, and had to meet with him eight times. She did not complete her assessment until December 18, 2014. In an email on that day she stated: "[The assessment] was a much more drawn out process than is typical with students of his age due to his very slow pace, his difficulty tolerating testing on some days, and his ability to only do brief sessions." Dr. Cunningham submitted her report in early January 2015.

STUDENT'S SENIOR YEAR (SCHOOL YEAR 2013-2014)

Validity of Senior Year Transition Plan

31. Student's transition plan was revised as part of his February 28, 2014 IEP. Student was interviewed and given a 126-question career assessment called COIN. Student's teacher Mary Beth Leland discussed his answers with him.[9] Student's answers indicated skills and interest in a wide variety of careers in addition to science. Student stated that arts, audio/video technology and communication, and science, technology, engineering and mathematics most accurately reflected his interests. The plan set forth the following goals:

a) Training or Education: "Upon completion of school . . . [Student] will attend College of Marin and then transfer to a 4 year college."

b) Employment: "Upon completion of school . . . [Student will do something in theatre or the sciences."

c) Independent Living: "Upon completion of school [Student] wants to live with his parents for the first 2 years of community college."

[9] Ms. Leland has a bachelor's degree in fine arts from the University of Massachusetts. She has a clear mild/moderate special education credential and is a certified behavior intervention specialist. Ms. Leland also has single subject and Crosscultural Language and Academic Development (CLAD) credentials and is a Highly Qualified Teacher under the No Child Left Behind requirements. She has taught Tamalpais's Counseling Enriched Class since August 2013. From 2008 to 2013, she was a resource specialist for the Berkeley Unified School District, where she also taught a special day class. She has also taught special education classes for the West Contra Costa and John Swett unified school districts

32. To support the education goal, the plan provided for activities such as visiting the college,[10] taking placement tests, enrolling, and investigating different support services in the community in case he would need academic support after leaving high school. To support the employment goal, the plan provided for "career exploration" and noted that Student was considering an internship with Marin Shakespeare or a position as a summer volunteer for Wild Life. To support the independent living goal, Student was to learn and practice taking public transportation to and from home and College of Marin. The plan did not propose a separate community activity.

33. The 2014 transition plan listed and updated Student's graduation requirements and course of study. Each of the transition goals cross-referenced the three annual goals in the new IEP for social-emotional improvement, interpersonal conflicts and employment. The IEP team updated the educational transitional goal to reflect Student's growing certainty about his career path. The team also updated the employment goal to reflect Student's continuing interest in science and also his growing interest in the theater.

34. The February 28, 2014 IEP team did not change the independent living goal. Dr. Cunningham's assessment mentioned that Student's practical living skills were "[p]articularly problematic." But that was not Dr. Cunningham's opinion; it was a description of the results on Parents' rating scales. That was the single source for her later statement that Student's practical living skills were "borderline." Dr. Cunningham did not test Student's independent living skills.

[10] The evidence did not show whether Student had visited the College of Marin pursuant to the 2013 assessment plan.

35. Ms. Johnston-Tyler's criticisms at hearing of the 2014 transition plan were similar to those she made of the 2013 plan. She added that its goals were not measurable, and it would have been "better" if the IEP team had developed it earlier, rather than a few months before graduation.

36. In Student's senior year, Ms. Leland engaged him in several significant activities relating to his transition to post-secondary life, some of which went beyond the specifics of his transition plan. She invited three guest speakers into her classroom to discuss their careers, and Student participated in the resulting discussions. She planned a fourth career workshop, on science careers, specifically for Student, but it was at the end of the year and Student did not attend. Student declined to attend a field trip led by Ms. Leland to the College of Marin, including its office for disabled students, because he preferred to visit the campus with Parents.

37. Ms. Leland facilitated Student's involvement in the community. She took Student on a field trip to Wild Care, a community nonprofit in San Rafael dedicated to animals, so he could learn about working in the nonprofit world. Student was interested in Wild Care, and applied for employment there. Ms. Leland wrote Wild Care a letter of recommendation for him, and he was later called in for an interview. Beginning in spring 2014, Student also became involved with Marin Shakespeare, and seriously considered a summer internship there. The record does not show whether Student was employed by Wild Care or whether he obtained the Marin Shakespeare internship.

38. In addition, Ms. Leland brought a representative of the College of Marin to her classroom to discuss the college's benefits, the credits required, the course catalogue, and related topics. Ms. Leland also organized a workshop presented by Paula Vantrease, the District's College and Career Center specialist. Ms. Vantrease discussed the details of enrollment in college with the class's seniors, and during that session Student enrolled in the College of Marin and printed out his certificate of enrollment.

Ms. Leland brought a College of Marin representative to the high school to administer the college's placement tests in a place in which her students were comfortable. Student preferred to take the test on the College of Marin campus, and when he missed his first appointment, Ms. Leland helped arrange another one.

39. With Ms. Leland's help, Student also registered through the Marin County Office of Education's workability program for the Personal Data Wizard, a website that guides students through activities such as getting a driver's license, writing a resume, taking online workshops, writing cover letters, and learning interview skills and budgeting. With Ms. Leland's encouragement, Student also participated in a workshop called "Summer 2014: How to Get a Life," in which he was an active participant. The teacher of that seminar later sent him some materials. Student was not attending school at the end of the year, so Ms. Leland created a transition portfolio that included notes from guest speakers and a letter of recommendation from her, and gave it to Parents.

Adequacy of Transitional Supports for Student's Return to Redwood High

40. In Student's senior year IEP, Tamalpais provided several supports for Student during his transition, including family therapy. At Parents' request, Tamalpais agreed to fund six additional sessions of family therapy between May 2 and July 19, 2013. It reimbursed Parents for Student's weekend participation in a social skills group called Autistry Studios from Student's return to through February 2014. Tamalpais also provided the extensive psychological, emotional and social support by placing Student in Ms. Leland's Counseling Enriched Class (CEC) for the fall semester.

41. The purpose of the CEC was to foster students' academic success by providing them needed emotional support. Ms. Leland was responsible for their academic studies; Lisa Fields, a school psychologist, was assigned full time to the class

to provide individual and group mental health support and parent consultation.[11] Two paraeducators, one of whom had a teaching credential, assisted them with academic support. The maximum class size was 15. The students had between one and five classes in the CEC, and spent the rest of their time in mainstream academic classes. As a result, there were usually only four to eight students in the CEC at any time. All students in the class took at least one academic workshop in the CEC, during which Ms. Leland worked with the group of four to eight students on the curriculum.

42. Support for social behavior was integrated into the entire CEC day. Ms. Leland taught social skills in the academic workshop by facilitating conversations between students at the beginning and end of each class so that students could model their conversation on others. Every Monday at a home room session, the students were required to report on their weekends; follow-up questioning then provoked discussions with the other students. During "Smart Period" every week, CEC students played language-based social games with facilitated support for their interactions.

43. Ms. Leland modified the curriculum in the CEC based on individual student needs. She used the same materials as were used in the mainstream classes, but shortened some assignments in order to work at the level of which each student was capable. For example, early in his stay in the CEC, Student developed a great deal of anxiety concerning some mainstream classes like economics, so Ms. Leland would

[11] Ms. Fields, who is referred to in some documents as Ms. Davidovitz, has a master's degree in psychology from San Francisco State University and credentials for school psychology and school counseling. Except for one year at the Campbell Union High School District, Ms. Fields has worked as a school psychologist for Tamalpais since 2010.

modify the depth of the work accordingly and give him only the assignments he was able to complete. She and the students stayed on the same course as offered in the mainstream class, which Ms. Leland ensured by checking regularly with the mainstream teachers.

44. Student testified that his counseling sessions with Ms. Davidowitz were inadequate because he was unable to trust her with information; he felt she advocated for the school district, not for him.

Least Restrictive Environment in Fall of Senior Year

45. The discussion at the IEP team meeting on March 5, 2013, showed that while Student had made substantial progress at Heritage, he still had some difficulties relating to others. He was being removed from class between one and four times a month due to conflicts with teachers, sometimes resulting in what Heritage described as "defiance, lower grades and an inability to work commensurate to his ability." The participants agreed that Student could not be returned to Redwood High School without some sort of transition between the highly supportive regime of Heritage and the mainstream of the comprehensive high school.

46. During the May 2 and June 10, 2013 IEP team meetings, the participants discussed Student's proposed fall schedule at length. They crafted a schedule placing him in mainstream classes for pre-calculus, physics, and drama, and in the CEC for classes in world history, economics, and two academic workshops. This schedule would have put Student in mainstream classes for 43 percent of the school day. Student and Parents agreed to the schedule and the IEP. Ms. Mostafa established that part of the purpose of having Student spend half his day in the CEC was to allow him to have time to develop relationships with the people who supported him there. Mr. Cedros established that while Student could do well in almost any individual mainstream class, he would probably not be able to manage five to seven of them at once. Having all his

classes in general education would have deprived him of time for counseling, therapeutic support, and grounding.

47. Student's aversion to special education resurfaced when he returned to California on July 19, 2013. He was determined to meet and socialize with as many people as possible, and decided he wanted to take all his academic subjects in mainstream classes. Parents agreed, and the family mounted a campaign of what Student described in his testimony as "relentless pressuring" of school staff to change his schedule. Over time, the campaign was mostly successful. School started on August 19, 2013. At a meeting on August 27, 2013, Ms. Mostafa agreed to an amendment to the IEP that would alter Student's course schedule so that he would take six courses rather than seven: Physics, Environmental Science and Drama in mainstream classes, and Economics, World History, and Academic Workshop in the CEC. Student's new schedule increased his time in mainstream classes to approximately 50 percent of his school day.

48. Although Student and Parents agreed to the new schedule on August 27, 2013, they immediately began seeking further changes. Liz McDonough, Student's therapist, emailed CEC staff on August 25, 2013, "hoping that [Student] could take another science class." She stated in her email that doing so would be good for his self-esteem. She opined that Student's class schedule was "a big shock" for Student, "as he had pictured himself fully immersed in mainstream Senior classes for the Fall . . . . It is understandable that he was heart-broken when the vision didn't match up to the reality." Ms. McDonough was apparently unaware that Student had been an active participant in working out (and agreeing to) his class schedule at the IEP team meetings of May 2 and June 10, 2013, and at the August 27, 2013 meeting with Ms. Mostafa.

49. On October 17, 2013, the IEP team agreed to move Student into a mainstream class in World History for the rest of the semester. For the rest of the semester, Student only took Economics and Academic Workshop in the CEC. Tamalpais

IEP team members regarded Economics as especially difficult for Student; it was a highly competitive class involving a lot of student interaction, and they feared his anxieties would prevent him from succeeding in it. The new mix of classes placed Student in mainstream classes 67 percent of his school day. It proved successful, and Student was permitted to take all his academic subjects in mainstream classes in the spring semester, leaving him only with Academic Workshop in the CEC. The parties agree that having Academic Workshop for both semesters was appropriate.

50. Student's transitional semester in fall 2013 was sometimes difficult. In the first two weeks of his work in the CEC, Student was so obsessed with the controversy about his schedule that he could not concentrate on his work, and instead told CEC staff his parents were going to get him out of the CEC. After two weeks, Ms. Leland took him aside and got his agreement to leave that controversy out of the classroom, whereupon he began to succeed in the CEC. However, Ms. Leland established that, late in the fall semester, Student was in so many mainstream classes that he was unable to keep up with all the course work, and this caused him extreme anxiety. He struggled in Environmental Science and sometimes in Physics. He began to miss classes and assignments because he could not face the teacher out of fear that he would let the teacher down. Ms. Leland counseled and supported Student through this difficulty and arranged meetings with his teachers at lunch, and his performance in the affected classes improved.

51. Student's psychological condition was mixed during the fall. He presented at school as active, involved, and happy, but he continued his perseveration over his course schedule. He testified that although he made it a point to behave cordially at school so he could get into general education classes, he was privately miserable and cried every day when Mother came to pick him up. As Parents told Dr. Cunningham, he also continued to be focused on the perceived injustices done to him when he was

removed from Tamalpais High during his sophomore year.

Personnel Required at the February 28, 2014 IEP Team Meeting

INTERRUPTION OF THE SERVICES OF AUTISTRY STUDIOS

52. Autistry Studios is a local, private transition program in which autistic students do work projects while getting social skills training. Mr. Cedros described it as "a safe place to build some skills." At the June 10, 2013 IEP team meeting, Parents requested funding for a 4-hour session each weekend at Autistry to reinforce Student's social skills. The Tamalpais members of the team agreed to fund the sessions, as a transitional measure, from the beginning of the school year until late February 2014. The Tamalpais team members were not willing to list the service as part of the IEP because Autistry is not a certified non-public agency. However, the IEP did commit Tamalpais to entering into a side agreement with Parents to fund Autistry for the agreed period.[12]

53. At the February 28, 2014 IEP team meeting, Parents requested that funding for Autistry be renewed for the rest of the year. The Tamalpais members of the team stated they lacked the authority to do that, since Autistry was not certified as a non-public agency, and that any request for its services would have to be handled outside the IEP process. They referred the question to Ms. Mostafa, who denied the request on March 24, 2014. However, at a meeting on April 30, 2014, the IEP team restored Autistry's services to Student's IEP. Student did not take advantage of the restored services because he had been expressing suicidal ideation, and the director of Autistry did not want him in the group out of concern he might hurt himself with the power tools they were using in their activities.

[12] This decision makes no finding about the legality of the process by which Tamalpais originally agreed to fund Student's participation at Autistry Studios.

54. Parents filed a complaint with the California Department of Education about the two-month gap in Autistry Services. The Department ruled that Tamalpais violated the Individuals with Disabilities Education Act by failing to have someone at the February 28, 2014 IEP team meeting who could approve or disapprove Parents' request for extension of Autistry services.

THE ABSENCE OF DR. CUNNINGHAM FROM THE MEETING

55. Neither party invited Dr. Cunningham to attend the February 28, 2014 IEP team meeting and she did not testify at hearing. Her report suggested that Student should receive "[c]ontinued social coaching, by Skype if necessary, as he makes the transition to college." Neither Ms. Leland nor Julia Vander Vennet, the administrator at the meeting, fully understood what Dr. Cunningham meant by "social coaching."[13]

56. In February 2014, Ms. Fields and Ms. Leland completed a psychoeducational assessment of Student, which they presented at the February 28, 2014 IEP team meeting. Their report contains a detailed summary of Dr. Cunningham's report. Ms. Fields described Dr. Cunningham's report and recommendations during the meeting. The IEP team adopted some of Dr. Cunningham's recommendations concerning accommodations, and declined to adopt her other recommendations.

[13] Ms. Vander Vennet has a master's degree in psychology from San Francisco State University. She is credentialed as a school psychologist and also has counseling and multiple subject teaching credentials, and a preliminary credential for administration. Ms. Vander Vennet has been a school psychologist for Tamalpais since 2012. Before that she held the same position in the Ross School District, where she was also the Special Education Coordinator, and earlier taught in several elementary schools.

Adequacy of Social Skills Training in Senior Year

THE INCIDENTS OF MAY 2014

57. In May 2014, a dispute about Student's harassment of a female student in his drama class led to his voluntary departure from school before the end of the school year. He became excessively focused on his relationship with her and, on May 7, 2014, she told school authorities that he had been following her around since February and posting on her Facebook page every day.

58. On May 7, 2014, the female student tried to go to the counseling office to report Student's conduct, but he blocked her until a teacher intervened. He threatened to fight another student who was accompanying her. Student was instructed to leave the two students alone, but in the next few days he openly defied those instructions. He began to talk of suicide, and posted on a school Facebook page that he was "done with his life."

59. On May 12, 2014, Student approached the female student in drama class but she said she wanted "space" from him and moved away, which upset him. The next day a supervisor saw him pursuing the female student in a parking lot. The female student told Student she did not want to speak to him and got into a car, whereupon Student approached the car yelling profanities at her and displayed his middle finger. Student was so upset that night that he held a knife to his throat and threatened suicide. He made similar threats at school. Mother locked up all the knives and medications in the house.

60. District officials did not suspend Student for this conduct. Instead, they ordered Student to stay at all times at least ten feet away from the students involved; not to be in or near the drama room when not directly working on drama; and to check

in daily with the school psychologist.[14] Student was informed an adult would visually monitor him at school. These restrictions angered Student, and he did not accept or obey them. In mid-May, Student yelled at other students and school staff on several occasions about the perceived injustice of his situation. On or about May 20, 2014, with the agreement of Parents and his psychiatrist, Student left school and did not return. Because he already had sufficient credits, he graduated with his class and with a diploma in June.

RELATIONSHIP OF MAY 2014 INCIDENTS TO SOCIAL SKILLS TRAINING

61. Student has received extensive training in social skills. He was in a social skills group in elementary school for two years. At Heritage he was taught social skills throughout the program. All during his senior year, Student received social skills training daily from Ms. Leland in academic workshop, and weekly in the CEC at Monday home room and again at smart period. Until February 28, 2014, he went on weekends to a four-hour session on social skills at Autistry Studios.

62. Tamalpais staff believed in Spring 2014 that Student already had adequate social skills; what he lacked on occasion was the emotional control to apply them. That view had considerable support in Student's records. In May 2011, Kathy Walsh, a speech and language pathologist for the Marin Special Education Local Plan Area, assessed Student and commented: "[Student] knows the appropriate responses to a variety of social situations and can deliver these responses effectively." She added, however, that he "exhibits challenges in his ability to act on his knowledge and to maintain appropriate social boundaries." Sometimes in class he would respond without raising his

[14] Student makes no claim that Tamalpais should have altered the mental health services he was receiving at the time of the May 2014 incidents.

hand, seek attention, make outlandish remarks, and engage other students in unduly lengthy conversations.

63. Tamalpais school psychologists reported in May 2011 that Student had poor impulse control and enjoyed the spotlight; he interrupted other speakers, sometimes left his desk to disrupt other students, and gave "the finger" to other students in class. A November 2011 manifestation determination attributed his stalking of the girl at Tamalpais High School not to a lack of social skills, but to his social anxiety and poor impulse control.

64. Witnesses at hearing made the same distinction. In Ms. Leland's CEC class, Student normally displayed good social skills. He made friends quickly and easily. Student displayed more empathy than most children his age. He had the highest academic skills among the students, and became a sort of academic "go-to" person for the other students. Student was quick to put his work aside to socialize or help someone. He was compassionate, well-liked, and sought after by other students. Student had no social skill deficits when he was calm; his social problems came when his emotions escalated. When his anxiety emerged, he had a hard time socializing, but that stemmed from his anxiety, not his social skills.

65. As Ms. Mostafa established, there is a difference between social skills and social anxiety. The former is skill-based; the latter is emotionally based. Student has social skills; he has difficulty with social interactions due to his social anxiety. He is sometimes unable to implement the social skills he has due to his emotional condition. Because of this difference, she opined, the incidents of May 2014 could not have been prevented by more social skills training. The incidents happened instead because the female involved was quite important to Student, and the fact that the relationship was not going in the direction he desired filled him with anxiety and disappointment. A distinct difference exists between the support a school would provide for someone who

did not understand social skills, and for someone like Student who did understand them and demonstrated that most of the time, but sometimes became overwhelmed with anxiety and no longer could implement them. In her opinion, Student did not require social skills support.

66. In Ms. Vander Vennet's opinion, the May 2014 incidents happened not because Student lacked social skills, but because his social anxiety is so great he could not manage the boundaries put up by the female student; he "emotionally . . . snapped." Ms. Fields agreed, and opined that Student did not demonstrate a lack of social skills in those incidents. His conduct was a product of his difficulties with social and emotional functioning. Mr. Cedros concurred that Student's social problems stem from his lack of emotional regulation and his social anxiety, not from any absence of social skills.

67. In Mother's opinion, Student's conduct in May 2014 and on other occasions was the consequence of a lack of social skills. However, Dr. Ruth Noel, student's psychiatrist, did not agree.[15] She appeared at hearing primarily to opine that the school's reaction to the May 2014 incidents was unduly punitive, an issue not

[15] Dr. Noel is an adult, adolescent, and child psychiatrist, and a graduate of the University of California at Santa Barbara and Tufts University School of Medicine. She served her pediatric residency at Oakland Children's Hospital and has had her M.D. degree since 1979. She is a licensed physician and an Assistant Clinical Professor in the Department of Psychiatry at the University of California at San Francisco's School of Medicine. Dr. Noel has extensive experience in the treatment of emotionally disturbed youth. She is not Student's primary therapist; she mostly manages his medications. Dr. Noel first met Student in October 2013 and saw him a total of three times in 2013 and perhaps five more in spring 2014.

presented here. But she also testified that Student's conduct in May 2014 was related to his emotional regulation deficits. He felt attacked, unsupported, and unfairly treated, and he did not have the coping capacity to manage the situation. He has problems in social skills, but his central trouble is with social thinking. Asked directly whether the removal of Autistry Studio's services "ha[d] anything to do" with the May 2014 incidents, she responded: "I cannot draw a parallel to those two things, but . . . he needed social thinking intervention . . ."

Adequacy of Academic and Social Goals in Senior year

68. Student has above average intelligence, is academically capable, and has never had trouble in academic classes except when his anxieties, depression, and other emotional challenges have interfered. His grades before Heritage were usually high, and only declined as part of his psychiatric collapse. In May 2013, late in his stay at Heritage, a teacher administered academic testing and reported that his academic skills were in the high average range compared to others his age. His performance was superior in written expression; high average in written language; and average in broad reading, math and math calculation. Student later obtained the highest possible score in math on the high school exit exam.

69. In the fall semester of his senior year at Redwood High, Student received A's in Drama, Academic Workshop, and Modified Economics; an A- in Physics; a B in World History, and a C in Environmental Science. During the spring semester, by the time of the February 28, 2014 IEP team meeting, his teachers reported he was receiving A's in Humanities and a B in Government. He was doing well on quizzes and tests in Environmental Science, and extremely well in Academic Workshop and Drama. He was among the top five students in Physics. The record does not contain his final grades, as he graduated without completing the semester.

70. At the March 5, 2013 IEP team meeting and in subsequent

correspondence, while Student was still at Heritage, Mother expressed concern that he was not completing homework assignments, and requested a goal for homework completion. Student responded that he was completing his homework assignments in a study class at Heritage. Heritage's discharge summary does not mention such a problem, and the IEP did not contain such a goal.

71. Student's academic performance at Heritage had been uneven because his anxiety frequently interfered with his concentration. He would speak out on what he perceived as unfairness to other students, and quarrel with teachers, sometimes to the extent that he had to be removed from the classroom. His anxiety and behavior in the classroom greatly affected his grades. Notwithstanding those difficulties, Student had completed the fall 2012 term with a 3.0 grade average, and by the time of the March 5, 2013 IEP team meeting, he was doing well in the spring semester.

72. Student's IEP for his senior year contained two social and emotional goals that addressed the interpersonal conflicts he was having at Heritage. The IEP did not contain goals for social skills deficits or academics. At the IEP team meeting on June 10, 2013, Parents requested the addition of an academic goal concerning note-taking to Student's IEP for the coming year. The team decided that Student had problems taking notes because he was not making entries in his planner. Accordingly, the IEP team added a goal involving the use of his planner. At the February 28, 2014 IEP team meeting, it was reported that Student had made substantial progress on that goal but had shifted to the use of an online calendar, which he did not consult regularly. The IEP team therefore modified the goal so he could focus better on his online calendar.

73. Student had homework completion problems in classes in which he struggled (Environmental Science, Government, and Physics), but was very good at completing work assignments in other classes in which he excelled, and which he enjoyed (Humanities, Economics, and Drama).

Lack of Tutoring

74. In Mother's opinion, Student required tutoring for the Scholastic Aptitude Test. In a letter to the IEP team in March 2013, she argued that Student needed SAT tutoring because, in September 2011 at Tamalpais High, he was unable to finish the Preliminary SAT due to an anxiety attack. Ms. Leland established that the February 28, 2014 IEP team did not agree to tutoring for the SAT because Student received that kind of support in Academic Workshop.

Adequacy of Reporting of Student's Progress on His Goals at His Last IEP Team Meeting

75. Tamalpais did not formally report to Parents on Student's progress on his transition goals at any relevant time.

76. Tamalpais reported to Parents on Student's progress on each of his annual goals at the IEP meeting on February 28, 2014, in the documentation of that meeting, and in the psychoeducational evaluation report by Ms. Fields and Ms. Leland of the same date.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA[16]

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)[17] et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.)

[16] Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

[17] All subsequent references to the Code of Federal Regulations are to the 2006

The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs. It must contain a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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version.

4. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a

due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387.)

ISSUES I.A, I.B, II.G: DID TAMALPAIS DENY STUDENT A FAPE IN HIS JUNIOR AND SENIOR YEAR BY FAILING TO OFFER HIM A TRANSITION PLAN UNTIL MARCH 25, 2013, AND BY FAILING TO OFFER APPROPRIATE TRANSITION PLANS?

Transition Plans and Services

6. Beginning not later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must also include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345, subd. (a)(8).) Every such IEP must also include transition services to assist the child in reaching those postsecondary goals. (*Ibid.*)

7. "Transition services" are a coordinated set of activities for an individual with exceptional needs that: (1) is designed within a results-oriented process that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including postsecondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation; (2) is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil, and (3) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if

appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

8. The law requires an IEP team to develop goals and activities addressing independent living skills only if "appropriate." (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).) Training in independent living skills in a transitional program is usually directed at students far less able to function than Student. (See, e.g., *Student v. Simi Valley Unified School Dist.* (OAH, July 18, 2008, No. N2007120033.)

9. School districts are required to provide transition planning and services starting when a disabled student is 16 years old. (Ed. Code, §§ 56043, subd. (g)(1), 56345, subd. (a)(8), 56345.1.) Generally it is inconsistent with the Act to delay transition services until a few months before a student's graduation. (*Letter to Hamilton* (OSEP 1995) 23 IDELR 721, 23 LRP 3421.)

10. A flawed or missing transition plan is generally regarded as a procedural error. (*Board of Educ. v. Ross* (7th Cir. 2007) 486 F.3d 267, 276; *A.S. v. Madison Metro School Dist.* (D. Wis. 2007) 477 F.Supp.2d 969, 978.) A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 [*Target Range*].)

11. Whether an IEP offers the student FAPE is assessed in light of information available at the time it is developed; it is not judged in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP "is a snapshot, not a retrospective"; it must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*

[quoting *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (Mansmann, C.J., concurring].)

The May 27, 2011 Transition Plan

12. In his closing brief, Student attacks the validity of a transition plan contained in his May 11, 2011 IEP. That plan did little more than announce that Student wanted to be a scientist and recite boilerplate graduation requirements. However, during the limitations period in this matter, that plan was in effect only from December 14, 2012, to March 5, 2013, during which time Student was in residential treatment at Heritage. All Student's criticisms of the plan relate to its provisions; he makes no claim that its operation had any particular significance or consequence from December 14, 2012, to March 5, 2013, and the complaint alleges no facts to support application of any of the exceptions to the statute of limitations. Because Parents knew of those provisions in 2011, the contention is barred by the statute of limitations.

The March 5, 2013 Transition Plan

13. Student's criticisms of the March 5, 2013 transition plan depend on the opinions of Ms. Johnston-Tyler about what should be in a transition plan. Many of Ms. Johnston-Tyler's views on what transition plans in general should contain were appealing. However, Ms. Johnston-Tyler's testimony was not particularly helpful in determining the legality of the plans written for Student. Ms. Johnston-Tyler did not appear to know Student, or to have talked to him, and did not assess him. She had examined his IEP's and some other documents selected by Student's counsel, but her familiarity with his records was partial; when shown two of the more important assessments of Student during the period in question, she did not recognize them.

14. Ms. Johnston-Tyler's opinions were almost always expressed in terms of what was needed for the transitions of autistic students generally, rather than what

Student needed. For example, she stated that autistic students should not be counted on to state their future ambitions accurately because they were usually developmentally delayed. However, Student's needs are quite different from those of the average autistic student. His diagnoses usually mention Pervasive Developmental Disorder Not Otherwise Specified or Asperger's Syndrome, both formerly used as designations of persons at the high-functioning end of the autism spectrum. The parties agree that Student is quite high functioning. The evidence showed that Student is physically and mentally competent to exercise the skills of independent living. He has always been with nondisabled peers in physical education. At Heritage he mastered rock-climbing. The evidence also showed that Student is highly social. Ms. Leland mentioned that sometimes he was so talkative with other students in her class that she had to redirect him. His difficulties derive not from a lack of social contact or interest, but from the consequences of his social anxiety. The typical needs of autistic students do not necessarily apply to Student.

15. Ms. Johnston-Tyler forthrightly testified that her agency wrote "Cadillac" transition plans that went beyond the requirements of law. She believes most of the standard transition assessments are inadequate, and uses a proprietary assessment of her own design. She did not purport to be familiar in any more than a general way with the minimal legal requirements of transition plans. Her criticisms were not couched in terms of alleged violations of law.

16. The March 5, 2013 transition plan fulfilled most of the minimum standards set forth in special education law. It had goals based on Student's plans, as measured by assessment, in the required areas of education, training and employment, and had activities related to those goals. Even Ms. Johnston-Tyler testified that the transition goals were measurable, if "barely" so. Student's argument that the transition goals were insufficiently coordinated with Student's annual IEP goals is not based on law; Student

cannot identify any legal requirement that addresses the relationship between the two kinds of goals.

17. Moreover, transition goals are quite different from annual goals in that they must reflect the desires and plans of the student (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a)(2)), whereas annual goals state the school's plans for the student over the coming year and set forth standards to be met while at school. (20 U.S.C. § 1414(d)(1)(A)(i)(II).) Transition goals also address performance after graduation, which will not be measured by the secondary school. Student cites no authority requiring an IEP team to provide the same level of specificity in transition goals as that required in annual goals.

18. Student did not discharge his burden of proving that the activities contained in the 2013 transition plan relating to the College of Marin were legally insufficient. The evidence did not show whether Ms. Leland's many activities in support of Student's enrollment preceded or followed the February 28, 2014 transition plan, which replaced its predecessor. It only shows that Student was eventually successful in enrolling in the College of Marin in fall 2014. The activity in support of employment was sufficient; it resulted in Student's having the planned two-month job on the Heritage campus. As shown below, the activity in support of independent living was not legally required.

19. The 2013 transition plan did not contain activities in the community. Student's job at Heritage was on campus, not in the community. (See *Student v. Horizon Instruction Systems Charter Schools* (OAH, Jan. 3, 2012, No. 2011060763, at pp. 22-23.) The plan's failure to contain community activities violated the IDEA's requirement that a transition plan include such activities.

20. The 2013 transition plan tasks Student with learning to take the bus to the College of Marin, and does not specify a role for Tamalpais in that activity. Districts

should not unilaterally delegate their transition responsibilities to parents. (See *In re Child with Disabilities* (SEA CT 1994) 21 IDELR 624.) However, the notes of the March 5, 2013 IEP team meeting, and uncontested testimony at hearing, showed that the activity of taking the bus was included in the plan at the specific request of Parents, who argued strongly for the goal and volunteered to implement it. Tamalpais offered to help implement the goal; Ms. Leland established that she offered to go over the bus schedule with Student, and offered to take him on a field trip in which he and she would take the bus together. Student cites no authority suggesting such a joint arrangement is impermissible, and did not present any evidence that showed Ms. Leland's assistance was inadequate, or even accepted. In any event the activity was not legally required, because Student did not meet his burden of proof that separate goals and activities for independent living skills were appropriate in the 2013 transition plan.

21. Nothing in the many assessments of Student that had been completed by March 5, 2013, showed that independent living skills was an area of need for Student. Although Mother testified at hearing that Student lacked numerous basic life skills, the information before the IEP team on March 5, 2013, did not support that claim. In his closing brief, Student does not identify any specific information generated by any professional that was before the IEP team on that date that would support the conclusion that Student required instruction in independent living skills. His argument depends entirely on the testimony of Mother.

22. When Mother expressed concerns about Student's independent living skills at the May 2, 2013 continuation IEP team meeting - such as sweeping the deck and cooking - Student's therapist disagreed that Student lacked the skills, stated that Student had been able to do his chores at Heritage, and argued that the events she mentioned were simply examples of Student's defiance or unwillingness that ought to be addressed in family therapy. That view was consistent with Student's previous

records, which emphasized the difficulty and complexity of Student's relationship with Mother.[18] In that context, the IEP team could reasonably conclude, from the exchange between Mother and the therapist, that Student lacked the willingness - not the skills - to do chores Mother assigned to him.

23. The fact that Student displayed adequate living skills at Heritage supports the conclusion that no transition goal in that area was appropriate for his 2013 transition plan. Therefore the alleged deficiencies in the independent living goal and activity in the plan have no legal consequence.

24. There was no evidence that the failure to have community activities in the 2013 transition plan had any effect on Student or on Parents' participatory rights. Student returned to California on July 19, 2013, determined to meet and interact with as many people as possible, and began school a month later. He produced no evidence that the lack of community activities denied him any educational or other benefit in that brief period, or later, related to the 2013 transition plan. Therefore, Tamalpais's procedural violation in failing to provide community activities in the 2013 plan did not deny Student a FAPE.

The February 28, 2014 Transition Plan

25. Student's February 28, 2014 transition plan complied with the requirements of law. Its goals were in the required areas and were based on Student's ambitions as reflected by interview and assessment. They were only loosely coordinated with Student's new annual goals, but no law requires a closer connection. The employment goal, that Student "will do something in theatre or the sciences," was

[18] On Student's 18th birthday he signed his educational rights over to Father alone.

vague, but that merely reflected the fact that Student had not yet foreclosed the possibility of a career in theater. In his closing brief, Student does not explain how that transition goal could have been any more specific. The independent living goal was the same as in the 2013 plan.

26. Ms. Johnston-Tyler's criticisms of the February 28, 2014 transition plan were unhelpful in determining its legality for the same reasons discussed above in relation to the 2013 transition plan. Her opinions were based on "Cadillac" standards that were higher than those of the law. They were not grounded in familiarity with Student in particular, but depended instead on her understanding of what most autistic students needed.

27. As Ms. Johnston-Tyler testified, it would no doubt have been "better" if the February 28, 2014 transition plan had been implemented earlier. OSEP has advised that it is inconsistent with the Act to delay transition services until a few months before a student's graduation. (*Letter to Hamilton* (OSEP 1995) 23 IDELR 721.) But Student's claim that Tamalpais was guilty of unlawful delay fails because it does not take into consideration the services set forth in the 2013 transition plan. Tamalpais began serious transition planning in spring 2013, when Student was still at Heritage and in his junior year.

28. Student's activities with Wild Life and Marin Shakespeare satisfied the requirement of community activities. Student does not argue in his closing brief that these activities were insufficient.

29. Student did not need an independent living skills goal in the 2014 transition plan. As shown above, Tamalpais reasonably decided at the March 5, 2013 IEP team meeting that goals and transition services in independent living skills were not necessary in Student's transition plan. Those reasons were still relevant to its decision a year later; Student had not suddenly lost his living skills. On February 28, 2014, the IEP

team was already very familiar with Mother's view of Student's life skills, and Dr. Cunningham's assessment contained nothing to alter their differing view of those skills. Dr. Cunningham reported on Parents' concerns about his skills but expressed no concern of her own. Student's convincing demonstration of independent living skills at Heritage remained the most important information before the IEP team. Student's present argument that he lacks those skills relies solely on Mother's oft-repeated perceptions and on the statement of Ms. Johnston-Tyler that "most" students with autism need independent living supports. Student did not bear his burden of proving that inclusion of independent living skills in the February 28, 2014 transition plan was required or appropriate to address his unique needs. The transition plan of February 2014 contained the minimum elements the law required and therefore did not deny Student a FAPE.

30. In his closing brief, Student devotes a single paragraph to arguing that the flaws in the 2014 transition plan somehow damaged him, and most of it simply repeats the alleged flaws. Only a single sentence directly addresses the question of prejudice, and that sentence is limited to referring to Mother's testimony at hearing that Student lacks independent living skills. As shown above, the weight of evidence shows Student does not lack those skills. Otherwise, Student cannot identify a single adverse consequence of the flaws in his transition plan.

31. There was no evidence that any alleged flaw in either of Student's transition plans had any effect on his education, his career ambitions, his educational plans, or any other aspect of his transition to post-secondary life. There was no evidence that his transition was less than entirely successful. There was no evidence that any flaw in the transition plans complicated his enrollment at the College of Marin, his obtaining courses, his arranging disability accommodations or transportation, or any other aspect of his post-secondary life. He was already involved in community activities through

Marin Shakespeare and Wild Life, and the evidence showed he was engaged in a sustained effort to meet and become acquainted with as wide a range of people as possible. There was no evidence he was isolated or without friends or activities. On this record, Student matriculated successfully to the College of Marin in fall 2014 without a single difficulty.

32. In addition, the many efforts of Ms. Leland were successful in facilitating Student's transition, and made a major contribution to it. Efforts far less than these were held adequate to establish that shortcomings in a transition plan did not deny FAPE in *Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist.* (1st Cir. 2008) 518 F.3d 18. The *Lessard* court rejected the argument that, seen in isolation, the transition plan in that case provided for inadequate exposure to community activities. (*Id.* at p. 30.) In doing so, it made the important point that analysis of the impact of a defective transition plan must focus on the student's entire program and particular needs: ". . . [I]n considering the adequacy of a myriad of transition services, an inquiring court must view those services in the aggregate and in light of the child's overall needs." (*Ibid.* [citation omitted].) It found that the overall transition plan and its implementation, as part of the student's overall program, provided adequate educational benefit and did not deny him a FAPE. (*Id.* at p. 30.) The evidence for that conclusion is even stronger here.

33. Any alleged flaw in Tamalpais's transition plans in his junior and senior years did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or cause a deprivation of educational benefits. They therefore did not deny him a FAPE.

ISSUES I.F, I.G: DID TAMALPAIS DENY STUDENT A FAPE BY FAILING TO ADMINISTER THE MATH AND SOCIAL STUDIES PORTIONS OF THE STAR TEST IN SPRING 2013, AND BY FAILING TO ADMINISTER ANY ALTERNATIVE TEST?

34. To provide a FAPE, a district must deliver special education and related services "in conformity with" a Student's IEP. (20 U.S.C. § 1401(9)(D).) In *Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 481 F.3d 770, 780, the Ninth Circuit held that failure to deliver related services promised in an IEP is a denial of FAPE if the failure is "material"; that is, if "the services a school provides to a disabled child fall significantly short of the services required by the child's IEP."

35. Student proved that he did not take the math and history/social science portions of the STAR test as required in his March 5, 2013 IEP. He did not prove why this happened, or that the incomplete taking of the test was the result of any conduct or omission by either Tamalpais or Heritage as opposed to his own conduct. Student did not prove any alternative test was available.

36. Student did not prove that Tamalpais's failure to administer two portions of the STAR test in 2013 was material or fell significantly short of Tamalpais's IEP obligations within the meaning of *Van Duyn, supra,* 481 F.3d 770. The evidence showed that Tamalpais did not use STAR results for educational programming. The check in the box reciting that the assessment planning team, not the IEP team, "reviewed ... STAR testing, transcripts" has an ambiguous meaning and is consistent with the testimony of Mr. Cedros and Ms. Mostafa that STAR testing informed the need for further assessment, but did not affect programming decisions. The fact that California no longer uses the STAR test supports that conclusion. In addition, Student's records consistently show that he excels in mathematics and has no difficulty with academic classes like social studies when he is emotionally stable. The incompleteness of spring 2013 STAR testing had no impact on Student's receipt of FAPE, his education, or Parents' participatory rights, and did not deny Student a FAPE.

ISSUE I.D: DID TAMALPAIS DENY STUDENT A FAPE IN HIS JUNIOR YEAR BY FAILING TO OFFER HIM APPROPRIATE ACADEMIC GOALS?

37. This claim appears in Student's complaint but is not mentioned in Student's closing brief. No evidence supported it. The goals Parents requested in the March 5 and June 10, 2013 IEP team meetings were for his senior year IEP. Tamalpais did not deny Student a FAPE by failing to offer Student appropriate academic goals in his junior year.

ISSUES I.E AND II.C: DID TAMALPAIS DENY STUDENT A FAPE IN EITHER SCHOOL YEAR BY FAILING TO PROVIDE STUDENT AN ASSESSMENT PLAN OR ASSESSMENT UNTIL JANUARY 2014?

38. Under certain conditions, a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) To obtain an independent evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (34 C.F.R. § 300.502(b)(1).)

40. The timelines for district assessments and for independent evaluations are different. Generally, a district must provide Parents an assessment plan within 15 days of the request for a district assessment, and hold an IEP team meeting to discuss the results within 60 days of receiving the signed assessment plan. (Ed. Code, §§ 56043, subds. (a), (c); 56321, subd. (a).) When parents request an independent evaluation, the public agency must, without unnecessary delay, either file a request for a due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); (b)(2)(i), (ii); see Ed. Code, § 56329, subd. (c).) But a district may not impose timelines on the conduct of the evaluation. (34 C.F.R. § 300.502(e)(2).)

41. Decisions concerning unnecessary delay in agreeing to an independent

evaluation or filing for due process illustrate that Congress does not contemplate a delay of several months in the conduct of an IEE. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289, p. 3*,* for example, the court determined that the school district unnecessarily delayed filing its due process request because it waited almost three months to do so. (See also *Taylor v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 105, 107-108, 111[four month delay unnecessary]; *cf. H.S. v. San Jose Unified School Dist.* (N.D.Cal. May 6, 2013, No. C 12–06358 SI) 2013 WL 1891398, pp. 2-4 [seven month delay unnecessary]; but see *J.P. v. Ripon Unified School Dist*. (E.D.Cal. April 14, 2009, No. 2: 07-cv-02084–MCE–DAD) 2009 WL 1034993, pp. 7-8 [delay of over two months not unnecessary due to ongoing efforts to resolve dispute during that time]; *L.S. v. Abington School Dist* . (E.D. Pa. Sept. 28, 2007, No. 06-5172) 2007 WL 2851268, p. 9 [ten-week delay not unnecessary in view of active efforts to resolve dispute in meantime.]

42. The regulation requires that the district "[e]nsure" that the independent evaluation is provided without unnecessary delay. (34 C.F.R. § 500.502(b)(ii).) Decisions concerning independent evaluations that are allegedly done too slowly are extremely fact-specific. (Compare *D.A. v. Fairfield-Suisun Unified School Dist.* (E.D.Cal. Sept. 18, 2013, No. No. 2:11–cv–01174–TLN–KJN) 2013 WL 5278952, [delay of approximately six months not unnecessary because mostly attributable to parents], with *Parent v. Dixon Unified School Dist.* (OAH, April 18, 2014, No. 2013090674 [delay of approximately six months unnecessary because nearly all attributable to district].)

43. Parents did not make clear whether their assessment request of April 12, 2013, was for a district assessment or an independent evaluation. The ambiguity persisted through the May 2, 2013 IEP team meeting and Mother's email of May 15, 2013, which proposed possible assessors including a school psychologist and Dr. Sullivan, who had previously conducted an independent assessment. However, during

the relevant time period there were many specific indications that the assessment was intended to be an independent assessment, and no specific indications otherwise. In their first request for the assessment, Parents gave as a reason for having the new assessment that they disagreed with Dr. Sullivan's assessment, which is required for an independent assessment but not a district assessment. Later, Mother insisted on assessment by someone who was independent of the district and its law firm, as Dr. Cunningham was. Ms. Mostafa's written proposal to Dr. Cunningham specifically offered to contract for an independent assessment, and after that date various district documents described the upcoming assessment as an independent evaluation. Parents did nothing to dispute this characterization.

44. Moreover, because Dr. Cunningham accepted Ms. Mostafa's written offer of a contract specifically for an independent assessment, the legal relationship between them called for an independent assessment. The mechanics of Dr. Cunningham's employment, including negotiation of a fee, were typical of an independent assessment, as were her separate arrangements with Student and Parents for assessment dates. Although evidence concerning the nature of the evaluation was not sufficient to be certain, the preponderance of the evidence showed that the assessment was an independent evaluation.

45. Tamalpais was guilty of only minor delay in April and May 2013, no matter which timeline applies. If the assessment is seen as a district assessment, Tamalpais had 15 days from the April 12, 2013 request – to April 27, 2013 – to present an assessment plan, and can only be faulted for a few days' delay until May 2, 2013. At the IEP team meeting of that date, Parents waived their right to the strict timeline concerning district assessments by agreeing to postpone receipt of the assessment plan until June so that the IEP team could decide on the areas needing assessment. If the assessment is seen as an independent evaluation, the delay between April 12 and May 2, 2013, was well within

the bounds of reasonableness.

46. Tamalpais moved promptly when Mother attempted to speed up the process by her email of May 15, 2013. Mr. Cedros presented an assessment plan by May 24, 2013, and reached an agreement for the assessment with Dr. Sullivan, whom Mother had suggested. When Mother changed her mind about Dr. Sullivan on June 5, 2013, she did so based on events in 2012. She was fully aware of those reasons when, on May 15, 2013, she proposed Dr. Sullivan. Had Mother not decided to disapprove Dr. Sullivan, the assessment would have been completed more quickly than it was. Tamalpais had to start from the beginning, on June 5, 2013, to find an assessor.

47. Tamalpais apparently did nothing to find an assessor between June 10 and August 8, 2013, when Parents again recommended Dr. Cunningham. This 59-day delay was prolonged, and almost within the realm of delays that courts have ruled excessive. However, it was mitigated by three factors. It occurred during summer, when Student was not in school. Student was unavailable for assessment until his return to California on July 19, 2013. Finally, a reorganization in Tamalpais' special education department had transferred responsibility for the assessment from Mr. Cedros to Ms. Mostafa, who handled the matter starting in August. In light of these circumstances, the 59-day delay, while unwise, was not legally excessive. None of the decisions cited above treats a delay of that length as creating liability in a district.

48. Tamalpais moved with appropriate speed from August 8, 2013 until Dr. Cunningham's assessment was completed. It was not unreasonable for the District to spend the 19-day period between August 8 and August 27, 2013, in negotiating a fee, obtaining a contract, obtaining permission from Parents to show Student's files to Dr. Cunningham, and then providing the files to her. The rest of the delay – from August 27, 2013 to the end of the year – was due to circumstances beyond the control of Tamalpais. Those circumstances were: a 10-day vacation Dr. Cunningham had previously

scheduled; Parents' insistence on not pulling Student out of classes to be assessed; and what Dr. Cunningham described as Student's "very slow pace, his difficulty tolerating testing on some days, and his ability to only do brief sessions." Overall, Tamalpais was responsible for only a minor part of the delay. Parents were responsible for substantial parts of it, and the nature of Student's disabilities was responsible for the rest. Tamalpais did not unnecessarily delay Dr. Cunningham's independent evaluation.

49. In the alternative, if Tamalpais did unnecessarily delay the independent evaluation, the effect of the delay on Student's education and Parents' participatory rights did not rise to the denial of a FAPE. Parents had ample information on Student's disabilities before he went to Heritage, and a great deal of more current information in the form of Heritage's detailed quarterly reports, as well as Heritage's thorough discharge summary of July 26, 2013.

50. In his closing brief, Student does not make a persuasive case that Dr. Cunningham's assessment mattered to the crafting of his IEP's. He describes Dr. Cunningham's report as being thorough and containing much information, but he cannot identify a single part of it that came as a surprise to anyone, or could potentially have any significant effect on Student's educational programming. As Ms. Fields testified, the information in Dr. Cunningham's assessment was information the parties already knew. Comparison of her assessment with its predecessors shows that Dr. Cunningham's report contained nothing substantially new. At Parents' insistence the February 28, 2014 IEP team adopted a few of Dr. Cunningham's recommendations for accommodations, but Student offered no evidence that he suffered anything from their absence earlier in the year. Student frequently spurned his accommodations anyway; he did not take extra time on tests, for example, because he did not want to appear to others as being anything but normal. Student argues that if the assessment had been completed more quickly, the parties would have had the chance to "flesh out" Student's

social skills support needs. But those needs had been fully discussed in spring 2013 and were being addressed in two different ways during the 2013-2014 school year, as shown below. Student also argues generally that Dr. Cunningham's report was important in determining Student's least restrictive environment, but cannot explain why this is so, or point to anything in the assessment that has any bearing on that subject. Nothing in the record supports the claim.

51. For the reasons above, any delay in Dr. Cunningham's assessment did not cause any deprivation of Student's educational benefits, impede his right to a FAPE, or significantly impede Parents' opportunity to participate in the decision-making process. Tamalpais did not deny Student a FAPE by delaying Dr. Cunningham's assessment.

ISSUE II.H: DID TAMALPAIS DENY STUDENT A FAPE ON HIS RETURN FROM HERITAGE BY FAILING TO PLACE HIM IN THE LEAST RESTRICTIVE ENVIRONMENT?

52. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1.)

53. In light of this preference for the least restrictive environment, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit Court of Appeals, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1)

the educational benefits of placement full time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. An alleged violation of LRE is analyzed as a substantive part of a FAPE. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

54. In discussing Student's return to Redwood High School, no one at the IEP team meetings in spring 2013 (with the possible exception of Student) believed it would be appropriate simply to return Student to the large, active, and highly competitive high school he had previously attended, where fellow students would remember him from his sophomore year. All agreed that some kind of transitional program was appropriate. Heritage was to say in July 2013 in its Discharge Summary that "[it] will take time for [Student] to take what he has learned in treatment in order to learn how to put it back into the home, school and social environment." Heritage's prognosis for his success was only "good to fair." As Ms. Vander Vennet pointed out, full immersion in general education courses would have required Student to cope with six or seven mainstream classes at once, making the transitions from class to class and interacting with about 30 students in each class, and also to take tests and do homework all on his own. Student's records showed he was unlikely to be able to do that.

55. The IEP team in spring 2013 had no information that would have supported an immediate and complete return to general education. The IEP team correctly took into account the fact that Student's last venture in general education had been disastrous; his and Parents' rejection of special education during his freshman and sophomore years ended in his psychological collapse and placement in residential treatment. No one at the meetings wanted a repeat of that experience. The IEP team's decision to place Student part-time in a special education classroom for transitional support was not only reasonable; a different decision would have been hard to defend.

56. The evidence showed that the conflict between school staff and Student and his family over his course schedule was heated at times, but the schedule changes served well to bring about a gradual transition between residential treatment and mainstream high school life by gradually reducing Student's time in the CEC. After the initial weeks in which Student had time to bond with the staff and students there, his mainstream exposure was increased. After mid-October, the only substantive class he took in the CEC was Economics. Ms. Leland established that the mainstream Economics course was so competitive and required so much interaction that Student was unlikely to succeed there. This was confirmed when Student's anxiety about his classes prevented him from completing all the Economics assignments he would have received in general education; Ms. Leland had to reduce the number and depth of those assignments to the level he could manage.

57. Student's argument that his fall class schedule was overly restrictive and removed him from the least restrictive environment is based entirely on his academic prowess. No professional testified that Student was emotionally and psychologically prepared to take all general education classes in fall 2013. Student's closing brief emphasizes his intellectual abilities but does not address his psychological condition during that time at all, except to say that general education improved his self-esteem. That does not establish that he was psychologically prepared for a full load of mainstream classes.

58. Student's academic ability has never been in doubt. What concerned the IEP team was not whether Student could grasp the material intellectually; it was whether he was psychologically and emotionally stable enough to handle a full schedule of general education. The evidence showed convincingly that he was not. Ms. Leland established that, late in the fall semester, the stresses of the general education classes Student was taking had begun to overwhelm him, and Ms. Leland's support was

necessary to put him back on track.

59. In addition, Student's psychological health during fall 2013 was unsteady. Student's testimony that he pretended to be happy and well-adjusted at school, but went home crying every afternoon, revealed an emotional instability that supported Tamalpais' view that he was not yet ready for full immersion in general education.

60. On balance, considering the factors set forth in *Rachel H., supra,* a schedule split between the CEC and mainstream classes was the LRE for Student in fall 2013.[19] Academically, Student would not have benefited from being in six or seven mainstream classes a day if he was not emotionally ready to cope with the stresses they involved, and he probably was not. Given his long history of conflict with peers, he would not have benefited socially from his exposure to nondisabled students unless he was in control of his emotions and his anxiety. Especially in the early weeks of the semester, his half-time presence in the CEC benefited him greatly; he settled down from the dispute over his schedule and formed good relationships with the other students and staff. With the October addition of general education World History, Student received all the general education he could manage. A greater general education load would probably have damaged his academic and social progress, because he was likely to become overwhelmed and begin disrupting classes (as he had as a sophomore) or

[19] The 1992 and 1993 decisions Student cites for the proposition that it is a school district's burden to prove that it placed a student in the least restrictive environment do not clearly support that proposition. Whatever its merit, the argument did not survive the Supreme Court's holding in *Schaffer v. Weast*, *supra,* 546 U.S. 49, that the party filing a request for due process hearing bears the burden of proving any denial of a FAPE.

cutting them. Ms. Leland's testimony that Student's general education load overwhelmed him at times showed that a greater general education burden would have been beyond his capacity in fall 2013. In placing Student in the CEC and gradually expanding his mainstream courses, Tamalpais did not violate the least restrictive environment requirement and did not thereby deny Student a FAPE.

ISSUE II.J: DID TAMALPAIS DENY STUDENT A FAPE BY FAILING TO PROVIDE APPROPRIATE SUPPORTS AND SERVICES FOR HIS TRANSITION FROM HERITAGE TO REDWOOD HIGH SCHOOL?

61. Student did not prove that the several transitional services Tamalpais provided Student for his return to Redwood High School were inadequate. With one exception, there was no evidence of any defect or shortcoming in the support he received in the CEC or from Autistry Studios. Student was critical of his therapy sessions with Ms. Fields, but in light of his psychiatric condition, his own evaluation of the usefulness of his therapy did not constitute substantial evidence. His distrust of Ms. Fields was consistent with his psychiatric record, and was likely a consequence of his mental health challenges rather than any flaw in her services. Tamalpais did not deny Student a FAPE in the transition services it provided.

ISSUE II.A: DID TAMALPAIS DENY STUDENT A FAPE BY FAILING TO ENSURE THAT ALL REQUIRED IEP TEAM MEMBERS WERE PRESENT AT THE FEBRUARY 28, 2014 MEETING?

62. A properly constituted IEP team that includes parents must make the basic decisions about a disabled student's special education and services. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.321-322, 300.324; Ed. Code, §§ 56340, 56342, 56342.5.) The school district must ensure the presence at IEP team meetings of someone who is knowledgeable about the District's resources. (34 C.F.R. § 300.321(a)(4)(iii).)

63. An IEP team must include at least one parent; a representative of the local

educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of the assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

Absence of Member With Authority to Decide About Autistry Studios

64. The California Department of Education's determination that Tamalpais violated the IDEA by failing to have someone at the February 28, 2014 IEP team meeting who could approve of the extension of Autistry's services is considered independently here. Its determination is persuasive. The original decision to fund Autistry's services was made by the IEP team in the IEP team meeting of June 10, 2013, though an agreement was executed outside the IEP process. The Tamalpais members of the February 28, 2014 IEP team were mistaken in their belief that they could not consider Parents' request to extend those services at an IEP team meeting. Tamalpais does not argue otherwise in its closing brief.

65. Tamalpais argues that since Ms. Vander Vennet was familiar with Tamalpais resources, her presence satisfied the statutory requirement, because the IDEA does not explicitly require that someone be present who can commit resources. However, the ability to commit resources is inherent in the role of an IEP team; every time it decides a student is eligible for special education, or writes a related service into an IEP, it commits district resources. The apparent purpose of the statutory requirement is to have someone present who can commit resources, even if tentatively, or at least make a recommendation about committing them. Whether Student needed Autistry's support was a question for the IEP team. Ms. Vander Vennet and the rest of the Tamalpais members of the IEP team failed even to approve or disapprove of Parents'

request for continued funding of Autistry, and took the position that they had no authority to do anything with Parents' request. Effectively, Tamalpais failed to have someone at that meeting who was able and willing to commit, or even recommend the commitment, of resources, although the IDEA required the presence of such a person. The procedural violation was prejudicial to Parents' right to participate in the IEP process because they could not seek from the IEP team the additional services they desired, and had to submit instead to a unilateral decision by Ms. Mostafa. To that extent Student was denied a FAPE by Tamalpais's procedural error.[20]

ABSENCE OF DR. CUNNINGHAM

66. Student argues that Tamalpais failed to have someone present at the February 28, 2014 IEP team meeting to explain Dr. Cunningham's report, and that Tamalpais should have invited Dr. Cunningham. However, Student cites no authority that would have required her presence. *Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1079, holds that the school district committed a procedural violation by failing to ensure the presence at an IEP team meeting of parents and a representative from the private school the Student was then attending. It does not support a claim that everyone with first-hand knowledge of the student must be invited.

67. Both Ms. Fields and Ms. Leland, who were at the IEP team meeting on February 28, 2014, were persons who could interpret the instructional implications of

[20] In Issue 2.b, Student contends that Tamalpais predetermined his placement and services at the February 28, 2014 IEP team meeting. The only argument Student now makes is that the decision to deny Autistry Services was predetermined. Because relief from that denial is granted on the separate ground above, Issue 2.b is not decided here.

the assessment results. Inviting Dr. Cunningham to the meeting, as a person who had knowledge or special expertise regarding Student, was not mandatory; it was at the discretion of the parties, including Student and Parents.

68. Even if Tamalpais had committed a procedural violation by not inviting Dr. Cunningham, that did not prejudice Student or significantly affect Parents' participatory rights. Dr. Cunningham's report was summarized in writing in the assessment of Ms. Leland and Ms. Fields, and described orally and discussed at the meeting. Two of the team members may not have fully understood what Dr. Cunningham meant when she recommended "continued social coaching," but the IEP team was very familiar with Student's social needs, which were being met daily in the CEC and for most of the school year at Autistry. Tamalpais did not deny Student a FAPE by failing to invite Dr. Cunningham to the February 28, 2014 meeting.

ISSUE NO. II.D: DID TAMALPAIS DENY STUDENT A FAPE IN HIS SENIOR YEAR BY FAILING TO PROVIDE HIM SUFFICIENT SOCIAL SKILLS TRAINING?

69. Student did not prove that Tamalpais provided him inadequate social skills training. No professional supported Mother's opinion, which was substantially outweighed by that of the four school psychiatrists who testified and the analyses of other professionals in Student's records. The preponderance of evidence showed that normally Student displays good social skills, but his serious social difficulties are related to his social anxiety and inability to regulate his emotions.

70. Student's social skills training in the 2013-2014 school year was substantial. He received it every day in the CEC's academic workshop and twice weekly in its special sessions. In addition, with the exception of the two-month gap between February 28 and April 30, 2014, Tamalpais financed four hours a week of social skills training for Student at Autistry Studios. There was no evidence of any shortcoming in either of these programs.

71. In his closing brief, Student asserts that the May 2014 incidents were "based in large part on his lack of social skills." The evidence did not demonstrate such a cause and effect relationship. Tamalpais's witnesses were unanimous and persuasive in testifying that Student's emotional deregulation and anxiety, not his lack of social skills, caused the incidents of May 2014. Even Dr. Noel, Student's psychiatrist, generally agreed with that analysis. Specifically, there was no evidence of a causal relationship between Tamalpais's two-month suspension of the services of Autistry Studios and the May 2014 incidents. Dr. Noel specifically declined to draw the conclusion that the two were related, and no professional testified that they were. Student's harassment of the female student had already begun in February 2014, when he was still attending Autistry social skills sessions. The evidence showed that the incidents of May 2014 were the consequences of his extreme social anxiety, his inability to regulate his emotions at times, and other aspects of his complex psychological condition, not any lack of social skills. Tamalpais did not deprive Student of adequate social skills training or deny him a FAPE by doing so.

ISSUE II.E: DID TAMALPAIS DENY STUDENT A FAPE BY FAILING TO FOLLOW DR. CUNNINGHAM'S RECOMMENDATIONS?

72. If a parent obtains an independent assessment, its results must be "considered" by the IEP team. (34 C.F.R. § 300.502(c)(1); Ed. Code, § 56329(c)(2d par.).) There is no requirement that the results or recommendations be adopted. Ms. Fields established in her testimony that Dr. Cunningham's recommendations were considered at the meeting. The IEP shows that a few of them (concerning accommodations) were adopted. The IEP team was under no obligation to adopt the others. Dr. Cunningham did not appear at hearing to discuss her recommendations, and there was no proof they were necessary for Student to obtain a FAPE. Student did not prove that Tamalpais denied him a FAPE by declining to adopt all of Dr. Cunningham's observations.

ISSUE II.F: DID TAMALPAIS DENY STUDENT A FAPE IN HIS SENIOR YEAR BY FAILING TO OFFER HIM APPROPRIATE ACADEMIC AND SOCIAL/EMOTIONAL GOALS?

73. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C.§ 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).)

74. No evidence supported Student's claim that his senior year IEP did not contain adequate academic or social goals. Tamalpais did provide a note-taking goal in June 2013 and modified it in February 2014. Student does not criticize those goals. While Mother requested a homework completion goal, no professional testified such a goal was necessary. Student did have problems with homework completion in some classes that he did not enjoy, but in classes he enjoyed he turned in his homework. Student offered no evidence that a goal would remedy this problem.

75. Student argues that his senior year IEP should have contained a goal to improve his social skills. As discussed above, Student did not have a need in the area of social skills. Student did not prove that Tamalpais denied him a FAPE by declining to include academic or social skills goals in his 2013-2014 IEP.

ISSUE II.I: DID TAMALPAIS DENY STUDENT A FAPE BY FAILING TO OFFER TUTORING OR SOCIAL COACHING?

76. Student offered no evidence to support Mother's claim that Student needed tutoring for the SAT in order to receive a FAPE. The only reason Mother advanced was that, in 2011, Student had an anxiety attack which prevented him from completing the Preliminary SAT. The evidence showed that Student's anxiety attacks are deeply rooted in his psychological challenges. No SAT tutor could do anything about them; they were a matter for therapy.

77. Student never explained the difference between "social coaching" and social skills training. To the extent they are the same, the contention is disposed of earlier. To the extent they are different, there was no proof that Student needed more social support than he was receiving. The fact that it was not entirely successful does not mean he needed more of it. Tamalpais did not deny Student a FAPE by failing to offer tutoring or social coaching.

ISSUES I.C. AND II.K.: DID TAMALPAIS DENY STUDENT A FAPE BY FAILING TO REPORT STUDENT'S PROGRESS ON TRANSITION GOALS, OR ON ANNUAL GOALS AT THE LAST IEP TEAM MEETING BEFORE STUDENT GRADUATED?

78. IEP's must contain a statement of the manner in which a district will report on a student's progress toward annual goals. (Ed. Code, § 56345, subd. (a)(3).) Student cannot identify any provision of law that requires a district to report on transition goals; there appears to be no such requirement.

79. Tamalpais adequately reported on Student's annual goals at his last IEP team meeting on February 28, 2013, and Student no longer contends otherwise. Whether Tamalpais failed to report progress on goals at the end of year is irrelevant; it is not part of this issue. Tamalpais did not deny Student a FAPE by failing to report his progress on goals.

REMEDIES

1. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized

assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

2. In some cases, a strict one-to-one correspondence between the violation and the relief is unwarranted. In *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 444 F.3d 1149 (*Park*), the student was disabled by cri du chat (5p-syndrome), a genetic defect that caused him developmental delay, deficient cognitive ability, poor muscle tone, speech and language delay, gross and fine motor delay, difficulty in muscle training and coordination, difficulty assimilating toilet training, self-care difficulty, drooling and behavioral difficulties. His IQ was below 70 and his primary language was Korean. (Id.at p. 1152.) The hearing officer found there was no evidence that it would help the child to receive compensatory education directly, so awarded it instead in the form of training for his teachers so they could better address his needs. The issue before the Ninth Circuit was whether training for the district's teachers was a proper form of compensatory education, and the court held that it was. (*Id.*, 444 F.3d at p. 1156.)

3. This case is similar to *Park, supra,* 444 F.3d 1149, in that Tamalpais's procedural violation deprived Student of some social skills training, but the evidence showed he did not, and does not, need social skills training. Therefore, no equitable purpose would be served by ordering Tamalpais to provide Student two months of social skills training at Autistry Studios. However, a significant equitable purpose, in the interests of Tamalpais's present and future special education recipients, would be served by improving Tamalpais's writing of transition plans, Student's 2013 transition plan procedurally violated the IDEA. His 2014 plan, while technically compliant, was not robust; it contained minimal information and left a great deal to the individual initiative

of Student's teacher, Ms. Leland. Had Student's 2011 transition plan not been beyond the statute of limitations, it would probably not have survived legal scrutiny. Therefore, as compensatory education for Tamalpais's procedural violation in processing Parents' request for an extension of the services of Autistry Studios, Tamalpais will be ordered to improve the training of its staff in the drafting of transition plans.

ORDER

1. Within one year of the date of this decision, Tamalpais shall furnish four hours of training to each of its employees involved in drafting transition plans. For this purpose it shall employ a professional who is not a District employee, and may be an attorney or other independent professional familiar with the specific legal requirements of the IDEA for transition plans. The training shall address all aspects of the requirements for transition plans, with some emphasis on the requirement for community involvement.

2. All of Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, each party partially prevailed on Issue II.a. Issue II.b was not decided. Tamalpais prevailed on all other issues.

RIGHT TO APPEAL

This decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: July 27, 2015

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings